

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

November 27, 2006 Session

HENRY ESTES vs. BRIDGESTONE AMERICAS HOLDINGS, INC.

**Direct Appeal from the Chancery Court for Rutherford County
No. 05-1548WC Robert E. Corlew, III, Chancellor**

**No. M2006-00834-WC-R3-CV - Mailed: February 13, 2007
Filed - March 23, 2007**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court our findings of fact and conclusions of law. In this appeal, the Employer, Bridgestone Americas Holding, Inc. (Bridgestone) asserts that the trial court erred in awarding to the Employee, Henry Estes, seven and one-half percent permanent partial disability to the right arm based upon inconsistent alternative findings of the trial court related to apportioning Mr. Estes' injury to his hand. Mr. Estes alleges the injury should have been apportioned to his hand rather than the arm. We conclude the trial court correctly found Mr. Estes' carpal tunnel injury should be apportioned to the arm and, based upon our review of the record, fix his impairment at five percent of the right upper extremity. Based upon this finding, we agree with the trial court that Mr. Estes will sustain a seven and one-half percent permanent partial disability to the right arm. Accordingly, the judgment of the trial court is affirmed.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Chancery Court
Affirmed**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which GARY R. WADE, J., and J. S. (STEVE) DANIEL, SR. J., joined.

Kitty Boyte, Nashville, Tennessee, for the appellant, Bridgestone Americas Holding, Inc.

Susan K. Bradley, Murfreesboro, Tennessee, for the appellee, Henry Estes.

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

Henry Estes began working for Bridgestone in November 1987. Over the nineteen years he worked there, Mr. Estes performed several jobs, each involving the repetitive use of his right hand and arm. In April or May 2005, he began experiencing problems with his hands. He was referred by Bridgestone to Dr. Ted Behar and was diagnosed with bilateral carpal tunnel syndrome. Dr. Behar performed surgery on the right hand on August 8, 2005, and, thereafter, the left hand became asymptomatic. Mr. Estes was released by Dr. Behar in October 2005. He returned to work without restrictions and was able to perform his previous job. He does experience pain in the right hand, especially after working about an hour, and, at times, requires the assistance of co-workers to assist him in lifting the preform molds he uses. His hand continues to grow numb from repetitive gripping. None of his symptoms extend into his arm.

Mr. Estes' claim for workers' compensation was tried on March 7, 2006. One of the issues presented to the trial court was whether the injury should be apportioned to the upper extremity or the hand.

Dr. David W. Gaw, a board-certified orthopedic surgeon testified by deposition. Dr. Gaw saw Henry Estes on November 9, 2005, for an independent medical evaluation. Mr. Estes gave a history of having experienced a gradual onset of tingling, aching and cramping in the right hand and some in the left hand. When the symptoms increased until they became problematic, he sought medical attention and was found to have bilateral carpal tunnel syndrome. Mr. Estes had carpal tunnel release surgery on the right hand on August 8, 2005. While his condition improved following the surgery, Mr. Estes reported to Dr. Gaw that he did not feel he had regained full strength in the hand. Dr. Gaw noted a minimally decreased sensation in the median nerve distribution, but no weakness or atrophy in the muscle groups of the hand. Dr. Gaw was of the opinion that Mr. Estes had a five percent impairment to the right upper extremity based upon the AMA Guides. Dr. Gaw admitted that Mr. Estes had an excellent result from his carpal tunnel surgery. In his opinion, however, anyone who undergoes a carpal tunnel release retains a five percent impairment even though he or she has a good result.

According to Dr. Gaw, the median nerve runs from the base of the neck, through the shoulder and into the hand. Its function, however, is mainly in the hand and fingers. While Mr. Estes' carpal tunnel problems did not affect him past the wrist, the nerve entrapment is between the wrist and the hand. Treatment of the condition frequently extends into the wrist which is anatomically separate from the hand. Dr. Gaw testified that the AMA Guides apportion carpal tunnel impairment to the upper extremity, rather than the hand. According to Dr. Gaw, a five percent impairment to the upper extremity in a carpal tunnel case would equate to a five percent impairment to the hand.

Dr. Ted A. Behar testified by deposition. He practices in the area of plastic and reconstructive surgery and is certified by the American Board of Plastic Surgery. Within his specialty, Dr. Behar performs carpal tunnel surgery. Dr. Behar first saw Mr. Estes on July 29, 2005. After taking a history and conducting an examination, Dr. Behar diagnosed him with bilateral carpal tunnel syndrome, right worse than left. Dr. Behar recommended a surgical release which was performed on Mr. Estes' right hand. Mr. Estes reported a resolution of the symptoms associated with his carpal tunnel disease in his right hand except for some residual aching soreness and loss of grip strength. On October 3, 2005, Dr. Behar felt he had reached maximum medical improvement and assigned a two percent impairment to the right upper extremity. According to Dr. Behar the AMA Guides provide for a zero to five percent impairment following a release. He acknowledged that many physicians, including some of those who contributed to formulating the AMA Guides, have taken the position that anyone who has undergone a carpal tunnel release is entitled to a five percent impairment. Because, however, the Guides provide for zero to five percent, Dr. Behar believed the physician should evaluate where within that range the particular patient fits and assign the impairment accordingly.

The trial court ruled that an injury involving carpal tunnel problems should be apportioned to the upper extremity rather than the hand. The court further determined that Mr. Estes was entitled to a seven and one-half percent vocational disability based upon the one and one-half times cap established by Tennessee Code Annotated section 50-6-241(b).¹ The trial court then made an alternative finding and, in so doing, stated:

Alternatively, should wiser bodies determine that, in fact, this should be apportioned to the hand rather than to the arm, we then would look more closely at the ratings that physicians have provided. In all fairness, we have some physicians who routinely testify that a zero is appropriate for a carpal tunnel injury. Frankly, it appears to us that anytime there is a surgical procedure, except in the most unusual of circumstances, some anatomical rating is appropriate. I think that's consistent certainly with Dr. Behar's deposition here.

I'll acknowledge to you. It's a little difficult to fathom a five percent; although we have the greatest respect of Dr. Gaw. He has certainly proven in the past to be very reasonable in his approach, and I think so here. It's just where you dogmatically say a zero or a five, regardless of any of the circumstances, that seems a little difficult to consider and recognize.

I think if we were to apportion the injury to the hand we would decide the proper anatomical rating is a four, which is a blend, frankly, between the two. We don't

¹The trial court specifically stated, in response to a question from Mr. Estes' attorney, that the seven and one-half percent is appropriate only because the law provides a one and one-half times cap. Otherwise, the trial court indicated, it would have awarded a vocational disability of twelve percent to the right arm.

determine the full five based upon the fact that evidence does show and the physicians have testified that Mr. Estes' problems, frankly, are more limited than in a number of circumstances, number of cases.

The trial court concluded its alternative finding by stating that should the injury have been apportioned to the hand, the court would have awarded an eighteen percent vocational disability to the right hand.

Following trial, judgment was entered awarding Mr. Estes benefits based upon a seven and one-half percent disability to the right arm. Both parties have appealed. Bridgestone alleges the trial court erred in awarding a seven and one-half percent disability of the right upper extremity based upon the trial court's inconsistent findings related to the hand. Mr. Estes alleges benefits should have been awarded based upon an injury to the hand rather than the arm.

II. SCOPE OF REVIEW

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhthoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997). Where the only dispute between the parties is the conclusion to be reached from the undisputed facts and evidence, the question on appeal is one of law and our review of the trial court's conclusions is de novo with no presumption of correctness. Id.

III. ANALYSIS

The backdrop of the issues raised on this appeal is the basis for the parties dispute as to whether the injury sustained by Mr. Estes in this case should be apportioned to the hand or to the upper extremity or arm. Tennessee Code Annotated section 50-6-241(b) provides that the vocational disability which may be awarded by a court is limited to one and one-half times the anatomical impairment sustained by an employee to the body as a whole or to certain scheduled members. Excluded from the scheduled members covered by this Code section are the loss of or injury to the fingers, toes, a hand, a foot, an eye or the hearing in both ears. Thus, injuries suffered to the latter scheduled members are not subject to the cap contained in the referenced Code section. Not unexpectedly, Mr. Estes takes the position the injury he sustained is to the hand and is not subject

to the cap. Bridgestone takes the contrary position that the injury is to the upper extremity and the cap applies.

The question with regard to whether a carpal tunnel injury should be apportioned to the hand or to the upper extremity is, under the record before us, one of law. While the relevant portions of the AMA Guides to the Evaluation of Permanent Impairment, (5th Edition) were not made exhibits in the trial court, it was undisputed that publication provides an impairment related to a carpal tunnel injury is to the upper extremity. Where the only dispute between the parties is the conclusion to be reached from undisputed facts and evidence, the question on appeal is one of law. Thus, our review of the trial court's conclusions is de novo with no presumption of correctness. See Vinson v. United Parcel Service, 92 S.W.3d 380, 384 (Tenn. 2002).

Tennessee Code Annotated section 50-6-204(d)(3)(A) provides that the degree of anatomical impairment sustained by an employee must be based upon the most recent edition of the AMA Guides or, in cases not covered by the AMA Guides, by an appropriate method used and accepted by the medical community. Tennessee Code Annotated section 50-6-204(d)(3)(B) provides that an impairment rating not based upon these standards shall be inadmissible as evidence during the trial of a workers' compensation case. Since carpal tunnel injuries are covered by the AMA Guides and provide for impairment to the upper extremity, the trial court was correct to reject an argument that a carpal tunnel injury should be apportioned to the hand. We agree with and affirm the trial court's determination that a carpal tunnel injury should be apportioned to the upper extremity.

Bridgestone alleges the trial court's disability rating was inconsistent with its findings of fact regarding the anatomical impairment rating. After carefully reviewing the record, we agree. While the trial court made no specific finding as to its impairment rating with regard to the upper extremity, it did find Mr. Estes entitled to a seven and one-half percent permanent partial disability to the upper extremity based on the one and one-half times cap. Clearly, it can be inferred the trial court based its award upon a finding of a five percent anatomical impairment. Then the trial court proceeded with its alternate finding relative to apportioning the injury to the hand. The trial court indicated that if it were to apportion the impairment to the hand, it would take a closer look at the two impairment ratings offered by the two physicians. The trial judge stated that he would have found the impairment to the hand to be somewhere between the two opinions and settled on a four percent anatomical impairment. The difficulty with the trial court's alternative finding is that the only proof before the court with regard to this issue came through the testimony of Dr. Gaw and was that, in a carpal tunnel injury case, the impairment to the hand would be the same as for the upper extremity.

Unfortunately, neither of the parties in this case pointed out the apparent conflict to the trial court. Had either done so, this matter could have been resolved long before the case reached this panel. Since the issue has been presented to us on appeal, the question we must answer is how best to resolve it. Because the testimony regarding anatomical impairment was presented to the trial court in the form of the depositions of Drs. Gaw and Behar, the weight and credibility of the evidence necessarily must be drawn from the contents of those depositions, and we may draw our own conclusions with regard to those issues. Bohanan, 136 S.W.3d at 624; Krick, 945 S.W.2d at 712.

In the interest of efficiency, rather than remand the case to the trial court, we have opted to make our own review of the medical testimony and draw our own conclusions regarding the extent of Mr. Estes' impairment.

We have carefully reviewed the depositions of the medical experts. Based upon the areas of expertise of the two physicians, the factual basis offered by each in support of their opinions and, particularly, the fact Mr. Estes has undergone a surgical release of his carpal tunnel with fairly significant residual symptoms, we have determined to accept the opinion of Dr. Gaw relative to impairment as being the more accurate of the two. Accordingly, we fix the permanent anatomical impairment sustained by Mr. Estes at five percent to the right upper extremity. Based upon this determination, we are in agreement with the trial court that Mr. Estes will sustain a seven and one-half percent permanent partial disability of the right arm.

IV. CONCLUSION

The judgment of the trial court is affirmed. The costs of this appeal shall be taxed to the Appellant, Bridgestone Americas Holding, Inc.

DONALD P. HARRIS, SR. J.

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
NOVEMBER 27, 2006 SESSION

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appeals to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by the Appellant, Bridgestone Americas Holding, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM